Argument in case of
Du Pont (Sme... Del.)

ARGUMENT

IN OPPOSITION TO

Henry A. Du Pont's Claim to the Office of United States Senator for the State of Delaware.

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Synopsis of Argument.

ARGUMENT IN OPPOSITION TO HENRY A. DU PONT'S CLAIM TO THE OFFICE OF UNITED STATES SENATOR FOR THE STATE OF DELAWARE.

I.—Statement of Facts.

The general assembly of the State of Delaware consists of a senate and a house of representatives. In each of these two branches of the legislature the three counties in the State are equally represented. The present constitution, which was adopted in 1831, provides, as did the constitution of 1792, that there shall be three senators and seven representatives chosen from each county. The legislature, therefore, when its constitutional membership is complete, consists of thirty members, of whom the senate has nine and the house twenty-one.

On the first Tuesday in January, 1895, the general assembly of Delaware met in regular biennial session, and each house duly organized by the election of officers. The senate chose as its speaker William T. Watson.

On the 8th of April, 1895, Joshua T. Marvil, the governor of the State, died.

By the constitution of Delaware (section 14, article 3), it is provided that "upon any vacancy happening in the office of governor by his death, removal, resignation, or inability, the speaker of the senate shall exercise the

office until a governor elected by the people shall be duly qualified."

In accordance with this provision William T. Watson, the speaker of the senate, on the 9th of April took the usual oath; and he has since exercised the office of governor.

Among other duties with which the general assembly of the State of Delaware, which met on the first Tuesday in January, 1895, was charged, was the election of a United States senator for the term of six years beginning on the 4th of the ensuing March. On the 16th of January the general assembly, having failed on the preceding day, which was the second Tuesday after its meeting and organization, to elect a senator, convened in joint assembly, and proceeded, under the act of Congress entitled, "An act to regulate the times and manner of holding elections for senators in Congress, approved July 25, 1866," to vote for a senator. The voting on that day having been without result, the balloting was continued from day to day till the close of the session, on the 9th of May, without the election of a senator. On that day the proceedings of the joint assembly were as follows:

The joint assembly convened at seven o'clock in the morning, and proceeded to vote for a senator; but, after further fruitless balloting, a recess was taken till twelve o'clock. When at that hour the joint assembly reconvened, William T. Watson, speaker of the senate, occupied the chair. The joint assembly then proceeded again to vote, Mr. Watson being recognized as the lawful presiding officer without protest from any quarter. But, [illegible] for the seventy-

seventh ballot for the day had been taken, a member of the senate, who had been voting for Mr. Du Pont for United States senator, arose and read the following statement: "This joint assembly consists of only twenty-nine members. The honorable gentleman now undertaking to preside and participate therein is the governor of the State and not now a senator." No further votes were taken. At three o'clock the general assembly, in accordance with a resolution some days previously adopted, was declared adjourned without day. The highest number of votes cast for any person for United States senator on the 9th of May was fifteen, one less than enough to constitute a majority of the joint assembly as then sitting and voting, unless the seat of Mr. Watson was legally vacant. On the ballots on which Mr. Du Pont received fifteen votes, Edward Ridgely received ten votes; John E. Addicks, four votes; and Ebe W. Tunnell, one vote: in all, fifteen votes, the same number as was cast for Mr. Du Pont.

II.—Propositions of Counsel for Claimant.

The argument in support of the claim of Mr. Du Pont to a seat in the senate of the United States is based on eight propositions. For convenience, as well as for the purpose of avoiding the possibility of misrepresentation, we will quote them in full:

1. It is a rule of the common law that no person shall exercise two incompatible offices at the same time.

2. Under the American system, executive and legislative offices are

incompatible, and no person can exercise both simultaneously, without express or implied statutory or constitutional authority.

3. There is no express or implied authority, in the Delaware constitution, for the simultaneous exercise, by the same person, of the offices of governor and senator; on the contrary, the constitution expressly interdicts such exercise of those two offices. And, therefore, at the time when Mr. Du Pont received fifteen votes, in the joint assembly, Mr. Watson was incapable of exercising the office of senator, if he was, at that time, the governor of Delaware.

4. Mr. Watson was, at that time, the governor of Delaware, and was, therefore, incapable of exercising the office of senator, or the office of speaker of the senate.

5. The theory that while Mr. Watson exercises the office of governor he is capable of exercising the office of senator and speaker of the senate involves great difficulties and endless absurdities. The opposite theory reconciles all the provisions of the Delaware constitution relating to the subject under consideration.

6. Governor Watson's exercise of the office of senator, in the joint assembly, and the office of president of that assembly, was illegal; and his vote for United States senator was a nullity.

7. If it had not been true that Mr. Watson was, on the 9th day of May, 1895, in every sense of the State constitution, the governor of Delaware, it would nevertheless have been true that he was exercising the office of governor, and was, therefore, incapable of exercising the office of senator, or the office of speaker of the senate; and that his disability could not be removed, for his senatorial term will end before a governor, elected by the people, can be qualified.

8. Mr. Du Pont having received a majority of the legal votes cast in the joint assembly, his right to the office of senator is not impaired by the fact that he fails to present the certificate of Governor Watson, as evidence of his election.

For the purposes of our argument, the eight propositions on which counsel for the claimant rely may be reduced to three. As it is admitted that Mr. Watson, on the 9th of May, 1895, either was governor of Delaware, or was exercising the office of governor—in other words, that he was either governor or acting as governor—propositions 3, 4, 5, 6 and 7, may be reduced to the single and simple proposition that Mr. Watson, on the

day in question, was not only not authorized, but was forbidden, by the constitution of Delaware, to act both as governor and as senator. Proposition 8, that the title of Mr. Du Pont, if he received a majority of the votes cast in the joint assembly, is not necessarily impaired by the fact that he fails to present the certificate of the governor, we freely admit.

The whole case of the claimant, therefore, as presented by his counsel, reduces itself to the three following propositions:

1. It is a rule of the common law that no person shall exercise two incompatible offices at the same time.

2. Under the American system, executive and legislative offices are incompatible, and no person can exercise both simultaneously, without express or implied statutory or constitutional authority.

3. The constitution of Delaware not only does not authorize, but expressly forbids, "the simultaneous exercise, by the same person, of the offices of governor and senator."

III.—Propositions of Opposing Counsel.

To these propositions we confidently oppose the following propositions:

1. *That there is no such rule known to the common law, as the rule "that no person shall exercise two incompatible offices at the same time."*

The rule of the common law is that no person shall *hold* two incompatible offices, and that, if two offices are incompatible, the acceptance of the second vacates the first. The common law, which has been called the quintessence of common sense, does not sanction the

rule that a man may hold two or more offices, the duties of which, by reason of their incompatibility, he cannot discharge.*

2. *That, under the American system, executive and legislative offices are not in themselves incompatible.*

Under the American system, as well as under other systems, the incompatibility of offices grows out of the incompatibility of their functions in the particular case. Such incompatibility may exist between offices in the same department, as well as between offices in different departments of the government. The fact that two or more offices happen to be in different departments of the government, as in the legislative and the executive, the legislative and the judicial, or the executive and the judicial, does not in itself render them incompatible.

3. *That the constitution of Delaware not only does not forbid, but that it expressly authorizes, the speaker of the senate, while holding that office, to exercise the office of governor.*

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* That counsel for Mr. Du Pont intend by the word "exercise," as here used, to distinguish the idea of performing the duties of an office from that of holding it, appears not only by the immediate context, but also by their whole argument. Their seventh proposition is manifestly founded on this distinction. Again, on page 10 of their brief, they suggest that the constitution of Delaware may mean either that the speaker of the senate may hold the office of governor, but "*shall not exercise the office of senator while he exercises the office of governor,*" or "that the speaker of the senate shall become governor, upon the death of the governor chosen by the people, and *shall absolutely vacate the office of senator, when he assumes that of governor.*" At pages 85, 91 and other places, they make the same distinction; and, as will appear, they are compelled in the end wholly to rely on the imaginary rule we have just quoted, based on this distinction.

IV.—Incompatibility of Offices at Common Law.

There is no such rule known to the common law as the rule "that no person shall exercise two incompatible offices at the same time."

Why counsel for the claimant have felt obliged to maintain the existence of such a rule, it is not difficult to conjecture. As will hereafter appear, the provision of the constitution of Delaware that the speaker of the senate shall, in a certain contingency, exercise the office of governor, had, until the 9th of May, 1895, always been held to mean that the person so exercising the office of governor did not vacate his senatorial office. In view of this fact, counsel for the claimant are forced to take the ground that the common law does not forbid a person to *hold* two incompatible offices, but only forbids him to "exercise" them "at the same time." But the rule of the common law is otherwise.

In order to show that the rule of the common law is that no person shall *hold* two incompatible offices, it is only necessary to refer to three cases cited in the brief for Mr. Du Pont.

In Milward *vs.* Thatcher, 2 Term R., 82, Mr. Justice Buller said:

> Now, if the offices be incompatible, his being a jurat before is no objection to his election; and if they be incompatible, the election to the latter office is good, because the acceptance of the second vacates the first office. . . . . The case of The King *vs.* Sir W. Trelawney, so far as the question was entered into, is an authority. There the court did not distinguish between a superior and inferior office; but Lord Mansfield expressly said that if the two offices were incompatible, the acceptance of the latter would imply a surrender of the former.

In the case of King *vs.* Pateman, 2 Durnf. & East, 777, Lord Kenyon said:

If an alderman be also a magistrate, and the town clerk act ministerially under him, then, indeed, these two offices cannot be held by the same person. Now, here is a question whether the town clerk's accounts are not allowed by the alderman; if they are, I think the two offices are incompatible, and this information should be for the purpose of trying that fact.

In Bryan *vs.* Cattell, 15 Iowa, 550, the common law rule is laid down as follows:

Our opinion is, that we are not confined to the statutory causes or events in determining whether a vacancy exists. If a party accepts another office, which, within the meaning of the law and the cases, is incompatible with that which he holds, we have no doubt but that the first one would become vacant. Thus, as is well said by appellant, if a Judge of a District Court should accept a seat upon this bench, a vacancy would be created in the first office, and yet the statute certainly does not, in terms, cover such a case. So, if the auditor of the State should take the office of treasurer; and many other cases that might be stated. . . . . Looking to the common law, we are of the opinion that the incompatibility must be such as arises from the nature of the offices, or their relation to each other. It must be such as arises from the nature of the duties, in view of the relation of the two offices to each other.

These are the cases cited by counsel in support of the proposition that no person shall exercise two incompatible offices at the same time. They completely refute it. They show the rule of the common law to be that no man shall *hold* two incompatible offices, and that if the offices are incompatible, the acceptance of the second vacates the first. Mechem, in his work on the Law of Public Offices and Officers, §420, states the rule as follows:

It is a well settled rule of the common law that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* absolutely vacates the first office and his title is thereby terminated without any other act or proceeding.

To this rule a few offices in England, which the incumbents could not relinquish without the consent of the crown, formed an exception. But there are no similar offices in the United States.

Paine, in his Treatise on Elections, §156, correctly says that "at common law the acceptance, by a public officer, of a second office, is an implied resignation of that first held, if incompatible with it."

V.—Incompatibility of Offices in the United States.

Under the American system, executive and legislative offices are not in themseles incompatible.

It is undoubtedly true that, in the American system of government, the separation of powers into three great departments, the executive, the legislative and the judicial, is fundamental; but it is wholly erroneous to suppose that this principle is peculiar to our system. The idea is at least as old as Aristotle, who, in his Politics, says that there are in every state three divisions: the deliberative or legislative assembly (*τὸ βουλευόμενον περί τῶν κοινῶν*), the magistracy (*το περί τας αρκας*), and the judiciary (*τὸ δικάζον.*)

> See *Fuzier-Herman's La Séparation des Pouvoirs.*

But, for the conscious recognition in the American system of government of the principle of the separation of powers, we are chiefly indebted to Montesquieu, who,

basing his observations on the English system, which he took as his model, demonstrated the beneficence of the principle.

In his Spirit of Laws, Book XI, Chapter 6, entitled "On the Constitution of England," Montesquieu says:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the Judge might behave with violence and oppression.
>
> There would be an end of everything were the same man, or the same body of men, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of trying the causes of individuals.

It is obvious, upon an attentive perusal of this passage, that Montesquieu did not intend to say that there could be no liberty where particular functions or offices, in two or more departments, were united in the same person. What he intended to say, and what he did say, was that there could be no liberty where all the powers of two or more departments were united in the same person or in the same body of persons.

This distinction was clearly understood by the framers of our constitutions, who, instead of attempting to keep the departments wholly separate, sought to a certain extent to unite them.

The principle on which our constitutions were formed, has never been more clearly stated than by Madison in paper No. 47 of the *Federalist*. In this paper Madison says:

The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

The British constitution was to Montesquieu, what Homer has been to the didactic writers of epic poetry. As the latter have considered the works of the immortal bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged; so this great political critic appears to have viewed the constitution of England as the standard, or, to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure then not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British constitution, we must perceive, that the legislative, executive, and judiciary departments, are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him; can be removed by him on the address of the two houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department, forms also a great constitutional council to the executive chief; as, on another hand, it is the sole depository of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The Judges again are so far connected with the legislative department, as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred, that in saying "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates;" or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme ex-

ecutive authority. This, however, is not among the vices of that constitution. The magistrate, in whom the whole executive power resides, cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The Judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act; though by the joint act of two of its branches, the Judges may be removed from their offices; and though one of its branches is possessed of the judicial power in the last resort. The entire legislature again can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy; and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise, lest the *same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the Judge* would then be *the legislator*. Were it joined to the executive power, *the Judge* might behave with all the violence of *an oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author."

Proceeding further to develop the true principle of the separation of governmental powers, Madison pointed out that notwithstanding the emphatic, and in some instances the unqualified, terms in which Montesquieu's axiom had been laid down, there was not a single American constitution in which the several departments had been kept absolutely separate and distinct. In some of them, executive and legislative functions were blended; in others, legislative and judicial functions were combined; in others yet, the executive poss[illegible] power of veto upon the acts of the legisla[illegible] examples of the blending of func-

tions, Madison refers to the constitution of Delaware of 1776, which was then in force; and in this relation he says:

> In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed three by each of the legislative branches, constitutes the supreme court of appeals: he is joined with the legislative department in the appointment of the other judges. * * * The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

It is clear that the blending of functions in different departments in the same person, is not a new thing in Delaware.

In their supplemental statement, counsel for the claimant quote from a speech of Mr. Webster on the subject of President Jackson's protest. In that case no question was raised as to the incompatibility of any functions with which the president was supposed to be invested. The charge made against the President was that, without possessing any authority to do so, he had set aside an act of Congress, and had thus usurped legislative power. The question at issue was defined by Mr. Webster thus:

> The legislature had fixed a place, by law, for the keeping of the public money. They had, at the same time and by the same law, created and conferred a power of removal, to be exercised contingently. This power they had vested in the Secretary (of the Treasury), by express words. The law did not say that the deposits should be made in the bank, unless the President should order otherwise; but it did say that they should be made there, unless the Secretary of the Treasury should order otherwise. I put it to the plain sense and common candor of all men, whether the discretion thus to be exercised over the subject was not the Secretary's

own personal discretion ; and whether, therefore, the interposition of the authority of another, acting directly and conclusively on the subject, deciding the whole question, even in its particulars and details, be not an assumption of power ? The Senate regarded this interposition as an encroachment by the executive on other branches of the government ; as an interference with the legislative disposition of the public treasure." 4 Webster's Works, 108–109.

While discussing this question, Mr. Webster pointed out the importance of preserving each of the departments from the encroachments of the others. But he did not omit also to point out that a perfect separation of the departments never had been established and perhaps never could be. In this relation he said :

The separation of the powers of government into three departments, though all our constitutions profess to be founded on it, has, nevertheless, never been perfectly established in any government of the world, and perhaps never can be. * * * Thus the Constitution (of the United States) says that all legislative power therein granted shall be vested in a Congress, which Congress shall consist of a Senate and House of Representatives ; and yet, in another article, it gives to the President a qualified negative over all acts of Congress. So the Constitution declares that the judicial power shall be vested in one Supreme Court, and such inferior courts as Congress may establish. It gives, nevertheless, in another provision, judicial power to the Senate ; and, in like manner, though it declares that the executive power shall be vested in the President, using, in the immediate context, no words of limitation, yet it elsewhere subjects the treaty-making power, and the appointing power, to the concurrence of the Senate. The irresistible inference from these considerations is, that the mere nomination of a department, as one of the three great and commonly acknowledged departments of the government, does not confer on that department any power at all. Notwithstanding the departments are called the legislative, the executive, and the judicial, we must yet look into the provisions of the Constitution itself, in order to learn, first, what powers the Constitution regards as legislative, executive and judicial ; and, in the next place, what portions or quantities of these powers are conferred on the respective departments, because no one will contend that *all* legislative power belongs to Congress, *all* executive power to the President, or *all* judicial power to the Courts of the United States.

Counsel for the claimant in their supplemental statement also say that the "substance and marrow" of the principle that the division of the government into three departments is a protection to popular liberty, "exists, not in the fact that it is a check upon legislative power, but in the fact that it is a check upon the executive power." In making this suggestion, counsel seem to have forgotten the significant fact that, in the government of the United States, as well as in the governments of most of the States, the executive is invested with the veto power. The observations of Mr. Madison, in No. 47 of the *Federalist*, are very pertinent to this subject:

> In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. * * * But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.

If any such absolute separation of powers were attempted as counsel for the claimant desire, the whole machinery of government would soon be brought to a standstill. Each department is required, in order to discharge its functions, to exercise powers which, by their nature, would seem to belong to one of the other departments. And while it is true that the distribution of powers among separate departments is funda-

mental in the American system, it is equally true that a certain blending of the functions of the executive and legislative departments is also within the design. Counsel for the claimant treat the examples of such blending in the constitution of the United States, and in the constitutions of many of our States, as so many breaches in the walls of separation, which must in the end produce confusion and danger. But it was not the partial blending of powers which was feared by the framers of our constitutions, but the absorption of one department by the other. Mr. Justice Potter, in his notes to Dwarris on Statutes and Constitutions (p. 85), after referring to the writings of Madison and of Story, says:

> When we speak of the necessity of this division of power between these departments of government as indispensable to public liberty, it is not meant to affirm that they must be kept so separate and distinct as to have no common link of connection or dependence in any sense whatever, but that the whole power of these departments should not be exercised by the same hands which shall possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principle of a free constitution.

The cases cited by counsel for the claimant in no wise affect what has been stated. In the case of Kilbourn *vs.* Thompson, 103 U. S. 168, the point decided by the court was, that a committee of the house of representatives had no power to make an investigation, judicial in its character, of a matter which was then pending before the courts, and in which congress had apparently no intention, if it had the power, to afford relief. In the case of Rice *vs.* Foster, 4 Harrington, 479, the point decided was that the legislature of Delaware could not, by a legislative act, resign its con-

stitutional functions by a proceeding in the nature of a *referendum.*

An illustration of how imperfect in practice the separation of the different departments of government is, may be found in the case of Mayor *vs.* The State, 15 Maryland, 376. In this case it was held that an act of the legislature, providing a permanent police for the city of Baltimore, under the control of a board of police, consisting of commissioners appointed by the legislature, was constitutional and valid, since the power of appointment to office was not, under our system of checks and balances in the distribution of powers, where the people are the source and fountain of government, a function intrinsically executive, in the sense that it is inherent in and necessarily belongs to the executive department. Yet, by the sixth article of the Declaration of Rights, which forms part of the fundamental law of Maryland, it is provided that "the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other, and no person exercising the functions of one of said departments shall assume or discharge the duties of any other." In respect to this provision, the court said, "But this article is not to be interpreted as enforcing a complete separation between these several departments. Practically it has never been so in any of the States in whose fundamental law the principle has been asserted. There are numerous instances to show that it has not been so regarded in this State, for our statute books contain, time and time again, laws affording relief where the judiciary possessed ample jurisdic-

tion over the subject matter. . . . . Instances of appointments by the legislature are equally, if not more numerous."

VI.—The True Test of Incompatibility.

From what has been said, it is apparent that the incompatibility of offices does not, in the absence of some specific provision of the constitution or laws, grow out of the fact that the offices are in different departments of the government. We say "in the absence of some specific provision of the constitution or laws," because there are in all the States, except Delaware, Kansas, New York, North Dakota, Ohio, Pennsylvania, Washington and Wisconsin, constitutional provisions expressly separating the three departments, and declaring that no person exercising power in one shall exercise any power in either of the others. Strictly speaking, these provisions do not involve the question of incompatibility. They are simply specific prohibitions of the collective exercise of certain powers.

Thus, the constitution of Alabama (Art III.) provides that "the powers of the government" of the State "shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy," and that "no person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." The same or a similar provision may be

found in the constitutions of Arkansas, California, Colorado and various other States. The constitution of Maryland, as well as the constitutions of certain other States, makes the prohibition absolute, without any excepting clause.

In the constitution of Delaware there is no clause like those above quoted. The constitution of Delaware, like the constitutions of New York and six other States, merely provides, in treating of each department, that the "legislative power" of the State "shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives" (Art. II, Sec. 1); that the "supreme executive powers" of the State "shall be vested in a Governor" (Art. III, Sec. 1); and that the "judicial power" of the State "shall be vested in a Court of Errors and Appeals," etc.

There is no doubt that this vesting of powers in three separate departments operates as a general prohibition of the usurpation and exercise by one department of powers belonging to either of the other departments. Thus it would, doubtless, violate the distribution of powers for the legislature to assume to take a case out of the hands of a court and pronounce judgment upon it, or for the executive to issue a legislative decree, or for a court to set aside an act of the legislature because it deemed the law impolitic. But it was not intended either to invest *all* power of a particular nature in any one department, or to preclude the same person in every instance from exercising power in two or more departments.

Even in those States in which, unlike Delaware, the

prohibition of the exercise of powers in two departments is made the general rule, there are exceptions of the greatest importance. In all or nearly all the various States in which there is a lieutenant-governor, that officer, a member of the executive department, is the presiding officer of the senate, and in this capacity can give a deciding vote. In some States he possesses, in the committee of the whole, the right to debate. In most States the governor has the power to make recommendations to the legislature and to veto its acts. He may grant pardons and commutations, remit fines and forfeitures, and thus temper the power of the courts. The legislature, or one branch of it, can sit as a court of impeachment, can punish for contempt, and can sometimes exercise the power of appointment or participate in its exercise. The courts constantly exercise the great power of declaring acts of the legislature unconstitutional.

As we do not find in the constitution of Delaware any general definition of what constitutes incompatibility of offices, let us ascertain what constitutes such incompatibility at common law. Of specific provisions of the constitution of Delaware, to which counsel refer as establishing incompatibility in the present case, we will treat hereafter.

Article 25 of the constitution of Delaware of 1776 provides:

> The common law of England, as well as so much of the statute law as has heretofore been adopted in the practice in this State, shall remain in force until [illegible] shall be altered by a future law of the legislature; [illegible] the rights and privileges

contained in the constitution, and the declaration of rights, &c., agreed to by this convention.

The affirmation thus made of the force of the common law in Delaware, of whose jurisprudence it is the basis, is recognized by clauses in the succeeding constitutions confirming the common law jurisdiction of the courts.

What is an office?

"That function by virtue whereof a man hath some employment in the affairs of another, as of the king, or of another person." Cowell, quoted by Jacob, Law Dict.

"It is said that the word *officium* principally implies a duty, and in the next place the charge of such duty." Bacon's Abridgement, tit. Office, A.

"A position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private." Burrill, Law Dict., Office.

"A right to exercise a public or private employment, and to take the fees and emoluments thereto belonging." 2 Bl. Com. 36.

"An employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental." 20 Johns. R., 493.

There is, therefore, in the mere idea of office nothing of exclusiveness, nothing that implies that the incumbent is confined to the discharge of a single public duty. An office is merely a function, and at common law the incompatibility of offices means nothing but the incompatibility of functions.

"Offices are said to be incompatible and inconsistent . . . when from the multiplicity of business in them they cannot be executed with care and ability; or when their being subordinate and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty." Bacon's Abr. tit. Office, K.

"A forester by patent for his life is made justice in eire of the same forest *hac vice*, the forestership is become void, for these offices be incompatible, because the forester is under the correction of the justice in eire, and he cannot judge himself; the same law is of a warden of a forest and of a justice in eire of the same forest." 4 Institutes, 310.

Various other examples of incompatibility may be given.

In Dyer's case, Dyer's Reports, 158 B, it was held that where a justice of the Common Pleas was appointed a justice of the King's Bench, the offices were incompatible, because the former position was subordinate to the latter.

In King *vs.* Pateman, 2 Term R., 777, it was held that a person could not at the same time be a town clerk and an alderman, since the clerk was an officer in the court of the alderman, and his accounts were adjusted and allowed by the alderman; at the same time, the court, Kenyon, C. J., said: "I do not think that the offices of alderman and town clerk are necessarily incompatible, for in some corporations an alderman is not a judicial officer."

In King *vs.* Gayer, 1 Burrows, 245, it was held that the

offices of justice of the peace and overseer of the poor were incompatible, because the accounts of the latter were subject to the control of the former.

Yet, "by a custom, the same person may be a judge, and an officer to execute process, for he acts in different respects; as, where bailiffs, or mayor and bailiffs are judges in the court of a borough, they may also be officers to execute the process of the same court." Comyn's Dig. tit. Officer, B 6.

"A mayor, who is judge of the court, may also be a gaoler, who has the custody of the prisoners committed by the same court." Comyn's Dig. tit. Officer, B 6.

The common law doctrine on this subject has been fully recognized in the United States.

In Bryan *vs.* Cattel, 15 Iowa, 538 (1864), the court say that the incompatibility "must be such as arises from the nature of the duties, in view of the relation of the two offices to each other."

Daly, J., in People *vs.* Green, 5 Daly, 254, 260 (1874), says:

> In the United States the common law doctrine of incompatibility of offices has been fully recognized, but the cases under it show that the mere fact of one incumbent holding two offices does not vacate the first, unless there is an incompatibility arising from the nature of the offices and their relation to each other, or from the necessity of the incumbent performing the duties of both offices at all times in person, and not by deputy.

In the same case, Robinson, J., says:

> Incompatibility of office exists as well by force of the principles of the common law as of constitutional and statutory provisions. It only arises at common law, when the one office is *subordinate* or subject to the *supervision* or *control* of the other, and upon the principle that *one cannot be master and servant, or principal and subordinate*. It did not arise from

the mere physical inability of the incumbent to be constantly present and engaged in the business of each, or to be ready to perform simultaneously all the duties they respectively required.

In this case (People *vs.* Green), it was held that the office of member of the assembly (legislative department), was not in the legal sense incompatible with the office of deputy clerk of the Court of Special Sessions of the City and County of New York (judicial department). In the course of an exhaustive opinion, the court said:

The Constitution of our State (Art. 3, Sec. 7), prohibits any member of the Legislature *receiving* any civil appointment within this State or to the Senate of the United States, or from the Governor, Governor and Senate, or from the Legislature, during the term for which he shall have been elected. And Article 3 (Sec. 8), also prohibits any person, being a member of Congress, or holding any judicial or military office under the United States, from holding a seat in the Legislature; and if any person shall, after his election to the Legislature, be elected a member of Congress, or appointed to any office, civil or military, under the Government of the United States, his acceptance thereof shall vacate his seat. There are various statutes relating as well to members of the Legislature as to other offices, inhibiting the holding or exercising the two (1 R. S., 103; *Ib.*, 109, Sections 26, 27; *Ib.*, 111, Sec. 30; *Ib.*, 112, Sec. 48; *Ib.*, 116, Sec. 2; L. 1853, C. 80, and others), but none otherwise affecting those under consideration.

The provisions of our constitution and laws, above referred to, affecting the office of a member of assembly, are to a great extent in harmony with the acts of Parliament relating to members of that body. The Statute 12 Wm. III, C. 2, prohibited any member who had any office or place of profit under the King or pension from the Crown from serving as a member of Parliament; this was repealed by 4 Anne, C. 8; but 6 Anne, C. 7, Sec. 25, enacted that no member of Parliament should hold any office in the government and sit in the house at the same time by virtue of his former election, "for by acceptance of an office his election is void," but he might be elected again on a new writ sued out, and sit in the house. By 1 Geo. I, C. 56, no person having a pension from the Crown *for years* could be elected a member; and by 15 Geo. II, C. 22, various officers of State were rendered incapable of being members. None of the Judges who were assistants to the House of Lords in the decision of questions of law, were eligible, but persons holding places in other Courts

were (Jac. Law Dic. "Parliament;" Cow. Law Dic. "Parliament;" 1 Bl. Com., 175).

A sheriff of another shire might sit in Parliament (Jac. Law Dic. *supra*), as was well maintained in the case of Lord Coke, who was nominated by Charles I to the office of Sheriff of Buckinghamshire, under the idea that he would thereby, from the incompatibility of the offices, be precluded from election to Parliament. He, however, was elected from Norfolk, and although he faithfully executed the duties as Sheriff, his right to his seat in Parliament was successfully maintained (4 Ld. Camp. Lives of the Chief Justices, 332-3; 2 Cobb. Par. Hist., 41, 44).

The common law and statutory laws of Great Britain existing in 1775, were adopted in our first constitution of 1777 (1 R. S., 32), so far as applicable to the state and condition of our country. A subsequent change was entirely within the scope of subsequent laws or constitutional provisions. Such as have been considered in no way prohibited one holding the office of deputy clerk of a local court from being also a member of the Legislature. The Constitution of 1846, in the provisions above referred to, considered the relations of a member to other offices, and while prohibiting his *acceptance* of other offices, it in no way provided against the holding of such a local office of which the member was previously an incumbent. Its provisions were directed against his acceptance of other offices after he became a member, and with a view to prevent the improper and corrupt influence which the hope or promise of such appointment might exert upon his conduct as a legislator. The novel condition of our own country, in its settlement and development, has occasioned the necessity for the holding of several offices by the same person, when he was deemed by the electors or appointing power capable and worthy of performing their various duties. * * * The incongruity of such duties has not, however, been regarded as an incompatibility of offices, except where such incompatibility exists under some strict rule of the common law, or is created by the Constitution or laws, and necessarily arises from their construction as to the duties imposed upon the respective offices. Otherwise, whatever evils have arisen or could arise from any individual holding a multiplicity of offices have found their remedy or correction in the discretion or judgment of the electors or appointing power. When such various honors are thrust or conferred upon the same person, and he accepts them, he takes them subject to all their duties, and becomes entitled to all the benefits legally to be derived from their possession. By the ordinary rule of construction, embodied in the maxim, "*Expressio unius est exclusio alterius*," the peculiar prohibitions of the Constitution and provisions of the Revised Statutes against a member of the Legislature *accepting* other specified offices should (especially where not otherwise controlled by common law) be deemed an affirmation of his right to hold others not so prohibited, and to leave his enjoyment of such offices to the discretion and responsibility of the electors or appointing power, or

those authorized to effect his removal, and by whose indulgence he may be permitted to retain office, without impeachment for neglect of his duties.

The power of the Legislature, of which the relator was a member, to pass laws affecting his local office did not create any incompatibility of office. All citizens, in office or otherwise, are equally subject to the action of that body; and whatever may be the personal interest of the legislator in the subject of legislation, he is not (aside from matters of delicacy or personal honor) precluded from taking part in its deliberations or acting upon the subject. In the present case, the Judge from whose decision this appeal is taken has instanced the attendance of numerous Judges and officials, including the Chancellor, as delegates in the convention that framed the Constitutions of 1821 and 1846, acting and deliberating on the very existence of the offices they held, their own powers, and all other incidents of their offices, without imputation of incompatibility, and far less of any legal or moral impropriety.

This case was carried to the Court of Appeals (People *vs.* Green, 58 N. Y., 295), where the court, Folger, J., said:

After the exhaustive opinions delivered in the court below on this point, it would be an unwarrantable use of time to go over the ground again, so well explored in them. It may be granted that it was physically impossible for the relator to be present in his seat in the assembly chamber, in the performance of his duty as a member of that body, and at the same time at his desk in the court doing his duty as deputy clerk thereof. But it is clearly shown in those opinions, that physical impossibility is not the incompatibility of the common law, which existing, one office is *ipso facto* vacated by accepting another. Incompatibility between two offices, is an inconsistency in the functions of the two, as judge and clerk of the same court—officer who presents his personal account subject to audit, and officer whose duty it is to audit it. The case of *Bryant* (4 T. R., 715, and 5 *id.*, 509), cited by appellant, does not conflict with this view. It was decided upon the meaning of the particular statute, which required the personal presence of the officer at the prison. Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and

tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must be subordinate, one [to] the other, and they must, *per se*, have the right to interfere, one with the other, before they are incompatible at common law. For the authorities sustaining these views, we refer to the opinions of the court below, where they are laboriously collected.

By the Constitution of New York from 1777 till 1846, the ultimate court of judicial appeal was composed of the lieutenant-governor, the senate, the chancellor, and the judges of the supreme court. In consequence of this blending of functions, the lieutenant-governor, a member of the executive department of government, exercised official functions in both the other departments. As president of the senate he participated in its judicial as well as its legislative proceedings, and he asserted and was accorded, although the constitution did not expressly give it to him, the right to vote in the determination of judicial questions. 29 Am. Law Review, 321.

Besides the examples given by Madison, in a passage heretofore quoted, of the blending of offices in the same person in Delaware, we may cite from Appleton's American Cyclopædia the following passage in relation to Thomas McKean, of whom it is justly said that "as a jurist he held a high position for integrity, impartiality and learning":

In September, 1774, he took his seat in the first continental congress, as a delegate from the lower counties in Delaware. He was a member of congress, of which he was elected president in 1781, until February, 1783, being the only member who served without interruption during the whole revolutionary period. In 1777, while still a representative in congress from Delaware, he was appointed Chief Justice of Pennsylvania, and in the same year he also officiated as president of the State of Delaware, for which he drew up a constitution.

We have seen that the office of appellate judge is incompatible at common law with that of judge of an inferior court, whose decisions are subject to review by the appellate tribunal. Yet, by article VI. of the constitution of Delaware, the court of errors and appeals, the highest appellate tribunal, is composed of the chancellor, and of judges of the superior court, a lower tribunal; and it is provided that at least one of the judges who sat in the trial of the cause shall sit in the appeal.

Every one is familiar with the case of John Jay, who, while Chief Justice of the United States, exercised the office of Minister to England.

It has been held that the offices of State senator and secretary of state are not incompatible, even though the secretary of state is elected by the general assembly. State *vs.* Clendenin, 24 Ark., 78. In this case Oliver H. Oates, a member of the senate of Arkansas, was elected by the general assembly to the office of secretary of state. By the constitution of the State, no member of the general assembly was elegible to any office within its gift during the term for which he was elected a senator or representative; but, Mr. Oates was at the time holding the office of senator not by election, but under a constitution which was adopted after his election, and which provided for the continuance in office of certain officers on taking a certain oath. Since, therefore, Mr. Oates was not disqualified by the constitution, it was held that he could fill both offices, the court saying that if, while holding the office of senator,

he had accepted "some other incompatible office," his office as senator would have been vacated.

In most of our States the lieutenant-governor, a member of the executive department, is presiding officer of the senate with power to cast a deciding vote, and sometimes to debate in committee of the whole. He is thus empowered to vote on laws which he may at any moment be called to execute, and which may most seriously affect the executive department.

The constitution of Rhode Island, which was adopted in 1842, eleven years after the constitution of Delaware, contains (Art. VI) the following provisions:

Section 1.—The senate shall consist of the lieutenant-governor and of one senator from each town or city in the State.

Section 2.—The governor, and in his absence the lieutenant-governor, shall preside in the senate and in grand committee. The presiding officer of the senate and grand committee shall have a right to vote in case of equal division, but not otherwise.

Evidently counsel were speaking purely *a priori* when they declared (supplemental statement, p. 4), that the case in Delaware "is probably the first example to be found in recent experience of an effort to arm the executive with the power to invade the legislature." Indeed, when counsel portray the executive as always an aggressive, unmoral and dangerous monster, armed with despotic powers, they suggest the suspicion that recent events in Armenia may have led them to dwell overmuch on partisan accounts of the Sultan of Turkey, and to forget what the executive of an American commonwealth really is.

The extent to which the combination of offices is sometimes carried in the United States may be illustrated by the following passage from *Harper's Magazine* (1874, Vol. XLVIII., p. 763):

> We are quite serious in recommending office-seekers to go to Gainesville, Florida. A correspondent sends a paragraph from the paper published in that place, which says: "When the Hon. L. G. Dennis left us for his Northern trip, to be absent several months, we lost in him our senator, county commissioner, board of instruction, deputy marshal, deputy sheriff, deputy county clerk, treasurer of school funds, custodian of county treasurer's books, senior councilman, and acting mayor. Nearly all public business was suspended until his return on the 21st October."

VII.—Particular Provisions of the Constitution of Delaware.

The constitution of Delaware not only does not forbid, but it expressly authorizes, the speaker of the senate, while holding that office, to exercise the office of governor.

In entering upon the discussion of this subject, it is necessary at the outset to say that a large part of the argument of counsel for the claimant is devoted to answering hypotheses which have appeared in the columns of the press. But these hypotheses, however ingenious they may have been, represented merely the views of their authors, and we do not feel called upon to consider the question of their soundness or unsoundness.

Thus, counsel devote thirty pages of their brief (pp. 34–63) to a demonstration of the fact that the speaker of the senate, in case of a vacancy in the office of gov-

ernor, becomes governor of the State. The matter counsel present on this head attests their industry, and may interest the curious, but it supports a proposition which we do not contest.

Under the constitution of Delaware, there is but one governor in the full sense of the term, and that is the governor elected by the people. Article III, section 3, provides that "the governor shall be chosen by the citizens of the State." By section 3 of the same article, the governor holds his office for a term of four years, and is not eligible a second time to the office. By section 4 of the same article, he is required to be at least thirty years of age.

These provisions are all inapplicable to a speaker of the senate who exercises the office of governor. A person only twenty-seven years of age may be a senator. A senator may, as occurred in the case of Governor Saulsbury, in 1866, be elected governor, while exercising, as speaker of the senate, the office of governor. The speaker of the senate does not exercise the office of governor for a particular term, but only "until a governor elected by the people shall be duly qualified."

Nevertheless, when the speaker of the senate of Delaware, in case of a vacancy in the office of governor, performs the duties of governor, he exercises for the time being the powers belonging to the office, and is entitled to its emoluments. He exercises the office *ad interim*, for the purpose of filling a vacancy. For this purpose he holds the office; and he continues to hold it till an elective governor is duly qualified, even though

his office as speaker or as senator may in the mean time have expired. But the exercise of the office of governor does not, as we shall show, affect his office as senator.

Counsel for the claimant, however, contend that there are two provisions of the constitution of Delaware, which in express terms make the offices of senator and governor in every case incompatible. If this were so, it might fairly be inferred that the framers of the constitution did not consider the two offices as inherently incompatible. But it can easily be shown that the provisions in question do not relate to the case of a speaker of the senate who is called upon temporarily to exercise the office of governor.

By section 12 of article II of the constitution, it is provided that "no person concerned in any army or navy contract, no member of congress, nor any person holding any office under this State, or the United States, except the attorney-general, officers usually appointed by the courts of justice respectively, attorneys at law, and officers in the militia holding no disqualifying office, shall, during his continuance in congress, or in office, be a senator or representative."

Counsel say that it "is impossible to deny, or doubt, that this is a positive declaration that no person, holding the office of governor of Delaware, shall, during his continuance in that office, be a senator."

The other constitutional provision on which counsel rely, is section 5, article III, which provides that "no member of congress, or person holding office under the United States, or this State, shall exercise the office of governor."

"The effect of this section," say counsel (p. 9 of their argument), "is not to declare that no senator shall be eligible to the office of governor, but to declare that no person shall exercise the office of governor, while holding the office of senator."

Yet, mindful of the fact that the settled construction of the constitution is against them, counsel almost immediately abandon this ground, deny "that a senator or representative, *while acting as such*, may, at the same time, exercise the office of governor" (p. 12), and declare that it "is not necessary for the determination of the issue in this case to decide whether the speaker, upon becoming governor, ceases to be a senator, or is only suspended in his functions as senator until such time as his term as governor shall end" (p. 19).

It needs no argument to show that both these positions cannot be maintained. If the provisions in question govern the present case, the speaker of the senate, when he enters upon the exercise of the office of governor, is incapable of holding the office of senator and his senatorial office *eo instanti* becomes vacant. He is not, and cannot be, under the language of the prohibition, merely "suspended in his functions as senator." He ceases to "hold" the office of senator, and it *ipso facto* becomes vacant.

If this theory of counsel were correct, a senator who was concerned in an army or navy contract would be merely "suspended in his functions"; and would be at liberty to exchange the character of senator for that of contractor, and VICE VERSA, *whenever and as often as he might find it profitable to do so.*

By the same logic, we might have a general assembly composed of members who were alternately contractors, their offices as legislators being suspended while they exercised their functions as contractors, and their functions as contractors being (perhaps) suspended while they exercised their offices as legislators.

But it is plain that the prohibition has no application to the case of the speaker of the senate when he exercises the office of governor. The prohibition is general, and must therefore yield in a particular case to an inconsistent specific provision, in accordance with the following well known rule of constitutional and statutory construction:

> Where there are words expressive of a general intention, and then of a particular intention incompatible with it, the particular must be taken as an exception to the general, and so all the parts of the act will stand. And, as a broad proposition, general words in one clause may be restrained by the particular words in a subsequent clause of the same statute.
>
> Bishop on the Written Laws and their Interpretation, Section 64.

Hence, also, the general prohibition that "no * * * person holding office under * * * this State, shall exercise the office of governor," must yield to the specific direction that, upon any vacancy happening in the office of governor, "the speaker of the senate shall exercise the office until a governor elected by the people shall be duly qualified." Treating the two clauses, therefore, as respectively general and specific, the exception thus made is as clear as if the prohibition had

been qualified by the phrase, "except as hereinafter provided." If the contention of counsel were correct, that general provisions must be absolutely enforced, a speaker of the senate or of the house of representatives, or a secretary of state, who did not possess the requisite qualifications of age, citizenship, and inhabitancy for the governorship, could not exercise the office of governor. But, in reality, the words "exercise the office of governor" have, in the prohibition now in question, a restrictive operation, and show that it was intended to apply only to an elective governor. Their manifest purpose is, by expressly restricting the prohibition to the *exercise* of the office of governor, to make it clear that a person holding another office may nevertheless be *elected* governor.

Counsel for the claimant not only take no certain position on the subject of incompatibility, but, in order to meet the well settled construction of the constitution of Delaware, they are forced to take positions which are conflicting and which it is impossible to maintain on any theory of law. Thus, in referring to the case of Charles Polk, who completed his senatorial term after exercising the office of governor, counsel say (p. 27 *et seq.*), that this case "is to be received for what it is worth, as an authority in support of the contention that, if Governor Watson's senatorial term had extended beyond the inauguration of a new governor he would not absolutely and permanently but only temporarily have vacated the office of senator, when he became governor. But in that question Mr. Du Pont has no interest."

With all deference we beg to suggest that, so far as Mr. Du Pont's claim of title depends upon the existence of the legal proposition here assumed, that a person may vacate one office by accepting another that is incompatible, and then, after exercising the latter, restore himself to the office which he had vacated, Mr. Du Pont's claim must utterly fail.

In other places, however, counsel, in order to meet the cases of Charles Polk and other speakers of the senate who, after exercising the office of governor, filled out their senatorial terms, recur to the position that the same person may continue to *hold* the two offices, though he cannot *exercise* them at the same time. Thus (p. 85), counsel say:

> If a governor elected by the people be qualified, before the expiration of his senatorial term, he (the speaker who exercised the office of governor) may, perhaps, without violating the State constitution, resume the exercise of the office of senator, as did Governors Rogers, Rodney, Stout and Polk, and if, upon his return to the senate, he find the office of speaker vacant, he may take the speaker's chair, *if the senate permit*.

Let us consider this paragraph for a moment. It involves an abandonment of the claimant's whole case.

It impliedly admits that it is impossible, in view of the precedents, to maintain that the senatorial office is vacated when the speaker of the senate exercises, under the constitution, the office of governor. It thus abandons the theory that the offices are either inherently incompatible or forbidden to be held together. Yet, in spite of the fact that the constitution provides that "the speaker of the senate shall exercise the office (of governor) until a governor elected by the people shall be duly qualified," and authorizes the senate in

the mean time to elect a speaker *pro tempore*, the paragraph assumes that the office of speaker at the same time may *or may not be* vacant. "If," say counsel, "upon his return to the senate, he (the speaker who has been exercising the office of governor) find the office of speaker vacant, he may take the speaker's chair, *if the senate permit.*" This language necessarily implies that the senate may have elected another speaker; and the situation contemplated is this: That the senate, instead of exercising the authority to elect a speaker *pro tempore*, may have instead two speakers, one *in esse* and the other *in posse*, the speaker *in posse* being the person whose vacation of the office has rendered it possible to elect another speaker. But, the incongruity does end here, for the speaker *in posse*, it seems, is not to be treated as a real speaker, but only as having capacity to take the speaker's chair, if it is vacant and *if the senate permit;* though in fact no one can take the chair otherwise.

To such extremities are we brought by the theory of counsel that a person may vacate one office after another, and yet possess the faculty of restoring himself to each of them in succession, if he happen to find them vacant. Counsel say that, upon their construction of the Delaware constitution, "there can never be either a supernumerary senator, or a supernumerary speaker of the senate." It is only by adopting theories suggested by writers for the press, that any question of a supernumerary relation can arise. No theory suggested by us could have such a result. But, counsel for claimant,

while expressing abhorrence of the idea of a supernumerary senator or a supernumerary speaker of the senate, find themselves driven to embrace a theory which requires the existence of senatorships and speakerships which are both vacant and not vacant.

But, apart from the specific direction that "the speaker of the senate shall exercise the office of governor until a governor elected by the people shall be duly qualified," there is another provision of the constitution which may be said to be decisive.

Section 5, Article II, relating to the general assembly, provides as follows:

> Each house shall choose its speaker and other officers; and also each house, whose speaker shall exercise the office of governor, may choose a speaker *pro tempore*.

Counsel for the claimant in vain strive to escape the force of this provision. They grow facetious over the idea that the words *pro tempore* "necessarily imply the contemporaneous official existence of another speaker," and point out that there may be a presiding officer *pro tempore* of a legislative assembly, though there may not be at the time a regular or permanent presiding officer. We do not controvert the argument, but it does not meet the case.

There may, undoubtedly, be a presiding officer *pro tempore* of a legislative body, before the election of a regular presiding officer; there may be a presiding officer *pro tempore* to act in place of the regular presiding officer, who is absent from his post; there may also be a presiding officer *pro tempore*, where the presiding office, being a separate and distinct office, is vacant,

as is the case where there is no vice-president of the United States and consequently no president of the United States senate.

But, in all these cases, the words *pro tempore* have the fixed and single meaning which they uniformly convey in our law and legislative practice, and denote the person who is called to fill for the time being, or temporarily, the presiding office. We take at random from different dictionaries the following definitions of the words *pro tempore*, all of the same invariable purport:

"For the time being, temporary; as, a secretary *pro tempore*." Century.

"For the time being; temporary, as a supply or provision; said especially of one who is acting in the absence of the regular incumbent of an office." Standard.

"For the time being; temporary; as, a *pro tempore* supply or provision." Imperial.

"For the time being." Webster.

"For the time being: temporarily; provisionally." Black's Law Dict.

Counsel for the claimant resort, in their extremity, to classical antiquity, in order to find among the poets and historians some rare and literary use of the words *pro tempore*. But, while we would not cast any reflection upon the accomplishments of the men who framed the constitution of Delaware, we cannot suppose that they employed their leisure moments in ransacking the Latin writers for words to insert in a misleading sense in that instrument.

But, even the rare uses of the words *pro tempore*, dis-

covered by counsel for the claimant, do not help their contention. In no sense of time or of exigency could the words *pro tempore* have been used in the constitution of Delaware, in the clause in which they are found, unless the speaker of the senate, while exercising the office of governor, had continued to hold his senatorial offices.

The speakership of the senate of Delaware is not a distinct office, nor an office having a particular term. Indeed, one of the principal arguments of counsel for the claimant, against the suppositious theory that the speaker of the senate exercises the office of governor merely as speaker of the senate, is the fact that the speaker of the senate may at any time resign his office, or may be removed from it by the election of another speaker in his place. If, therefore, the speaker of the senate, when he exercises the office of governor, vacates his senatorial office, the situation is precisely the same as that which existed at the commencement of the session of the legislature. The vacancy would be the same, the exigency would be the same, and the occasion would be the same. There would be no ground whatever for describing the person so elected as a speaker *pro tempore*. The title and the tenure of his office would be precisely the same as those of his predecessor; he would simply be a senator chosen to preside.

But the use of the word "may," in connection with the election of a speaker *pro tempore*, also discloses the meaning of the constitution. Counsel for the claimant argue that the word "may" should in this relation be construed to mean "shall." We do not deny that the

word "may" should be so interpreted, when the proper construction and effect of the law require it. Nevertheless, in statutes and constitutions as well as in common parlance, the word "may" is ordinarily permissive, and the word "shall" is ordinarily compulsory. In the present case, they were evidently intended to be used in their proper senses, since they are sharply contrasted in the same clause. Each house, says the constitution, "shall" choose its speaker and other officers; and also each house, whose speaker shall exercise the office of governor, "may" choose a speaker *pro tempore*. Even assuming that the word "may," as here used, might under any circumstances be construed to mean "shall," this compulsory meaning could be ascribed to it only where, in the actual absence of the speaker from the senate, it became necessary to elect a temporary presiding officer. If the place of speaker were vacant, the person elected to fill it would be speaker, not speaker *pro tempore*.

Yet, after all their discussion of the possible meanings of the word "may," and of the ancient literary uses of the words "*pro tempore*," what conclusion do counsel reach as to the true construction of the clause we are now considering in the Delaware constitution? In order to avoid any possibility of misunderstanding, we will quote their conclusion textually (brief for claiment, p. 19).

> The true construction of this section is not that it is optional with the speaker either of the senate or of the house, while exercising the office of governor, also to perform the functions of speaker and senator or representative; but that, when the speaker shall exercise the office of governor, the house shall have authority to choose another speaker. This leaves

it open for construction, when occasion arises, to determine whether or not, by becoming governor, the speaker thereby vacates his offices of senator and speaker.

It is difficult to conceive how counsel, after finding themselves compelled to place upon the clause such a construction as that just quoted, could have deemed it worth while to proceed further with their argument. If, as they admit, the clause "leaves it open for construction, when the occasion arises, to determine whether or not, by becoming governor, the speaker thereby vacates his offices of senator and speaker," it necessarily follows that the claimant has no case, for it has been determined in Delaware, as we shall now proceed to demonstrate, that the offices of senator and speaker do not become vacant in the contingency under consideration.

There is no question on which the decision and practice of the competent authorities of a State are more binding than that of the positive construction of their own constitution. In Mayor *vs.* State, 15 Md. 376, 458, the court well say that "the constitution may receive an interpretation from a long, constant, and uniform legislative practice. There are also instances in which the common opinion of the profession, and the forms and course of judicial procedure have been regarded as safe guides in the adjudication of points of law. * * * Is it not as important, that the interpretation of the fundamental law should be as uniform and certain as that of legislative enactments? In both, the intent of the authors is the point to be arrived at, and the same rules and means of ascertaining it may be resorted to."

Delaware has had three constitutions — the constitution of 1776, the constitution of 1792, and the constitution of 1831, which is still in force. With the arrangements of government under the constitution of 1776, we are not now concerned. But in the constitutions of 1792 and 1831, the provisions which are alleged to apply to the question under consideration are substantially the same. Both provide that, "No member of Congress, nor person holding any office under the United States, or this State, shall exercise the office of governor," and both also provide that in case of a vacancy in the office of governor, the speaker of the senate "shall exercise the office" till another governor shall be duly qualified.

When William T. Watson, on the 9th of May, 1895, took the chair as speaker of the senate, it had repeatedly been determined in Delaware that the exercise by the speaker of the senate of the office of governor did not affect his senatorial office.

We have already referred to the passage in the argument of counsel (p. 85), in which they admit that Messrs. Rogers, Rodney, Stout and Polk, after exercising the office of governor, served out their respective terms in the senate. We will refer to certain incidents in these cases.

Section 13, article II, of the constitution of 1792, provides as follows:

> When vacancies happen in either house writs of election shall be issued by the speakers respectively, or, in cases of necessity, in such other manner as shall be provided for by law; and the persons thereupon chosen shall hold their seats as long as those in whose stead they are elected might have done if such vacancies had not happened.

This provision stands in the same place, and in the same language, in the constitution of 1831. In section 3, article II, of the latter constitution, there are also the following clauses:

> If the office of representative, or the office of senator, become vacant before the regular expiration of the term thereof, a representative or senator shall be elected to fill such vacancy, and shall hold the office for the residue of said term.
>
> When there is a vacancy in either house of the general assembly, and the general assembly is not in session, the governor shall have the power to issue a writ of election to fill such vacancy; which writ shall be executed as a writ issued by the speaker of either house in case of a vacancy.

Daniel Rogers, speaker of the senate, exercised the office of governor from September 30, 1797, when Gov. Bedford died, till January 15, 1799, when Richard Bassett, a new governor, was duly qualified.

On January 2, 1798, the legislature of Delaware met. On January 3 we find in the senate journal the following entry:

> A writ issued by the speaker of the senate, directed to the Sheriff of Sussex county, was read commanding the said Sheriff to hold an election at the Court house in Georgetown, for said county, on the first Tuesday of October, 1797, for the purpose of electing a member of the Senate, instead of George Mitchell, whose seat had become vacant by resignation; a return thereupon was read, by which it appeared that Woodman Stockley was elected in the room instead of (*sic*) the said George Mitchell.

Daniel Rogers had not resigned his seat in the senate; it was not declared vacant; and no writ was issued by the speaker for an election to fill his place, although to that very session a writ to fill a vacancy was returned.

The term of Daniel Rogers as senator expired by limitation in October, 1798, but he continued to "exercise

the office of governor" till Tuesday, January 15, 1799. Counsel were inadvertent in their statement that he served out his term in the senate after exercising the office of governor.

Such was the fact, however, in the case of John Sykes, speaker of the senate, who exercised the office of governor from March, 1801, when Richard Bassett resigned, till January 19, 1802, when David Hall, an elective governor, was duly qualified. While Mr. Sykes was exercising the office of governor a general election was held, and the legislature met, yet it was not suggested that his seat as senator was vacant, and after he ceased to exercise the office of governor he served out his term as senator.

Jacob Stout, speaker of the senate, assumed the executive duties on the resignation of Governor Clark, January 15, 1820. At this time Mr. Stout was a senator from Kent county and the legislature was in session.

On January 6, the senate had taken notice of the death of Henry Molleston, a senator from Kent county, and the speaker had issued a writ to the sheriff of Kent county, commanding him to hold an election to fill the vacancy (Senate Journal, 1820, p. 17). This writ was returned January 15 (Id., p. 57). No vacancy was declared in the case of Mr. Stout, and he served out his term in the senate, after exercising the office of governor.

An incident in the case of Mr. Stout may be noticed. Under the constitutions of 1792 and 1831, the governor of Delaware exercises perhaps less power than the executive of any other State in the Union; and the only case

in which his approval of a legislative act is required, is that of a constitutional amendment proposed by the legislature. Such an amendment was passed by the senate on January 15, Mr. Stout presiding and voting. Later in the day he was sworn to exercise the office of governor; and in the latter capacity he approved on February 1 the amendment on which he had previously voted.

While Mr. Stout was exercising the office of governor, Caleb Rodney was elected speaker *pro tempore*.

In April, 1822, Mr. Rodney, being then speaker of the senate, himself assumed the executive authority on the death of Governor Collins, and, after exercising the office of governor, served out his term in the senate. The same thing occurred in the case of Charles Thomas, speaker of the senate, who assumed the executive authority on June, 24, 1823, on the death of Governor Haslet.

In contrast with these cases is the case of Samuel Paynter, who, in 1823, while a senator from Sussex county, was elected to the office of governor. The day before his inauguration, which took place on January 20, 1824, he resigned his office as senator, in view of the constitutional provision that no person holding any office under the State shall exercise the office of governor. Had he not resigned his senatorial office, it would have become vacant on his inauguration.

The case of Charles Polk is the first case of a speaker of the senate exercising the office of governor after the present constitution of Delaware was adopted. Mr. Polk had already been a regularly elected governor of Dela-

ware from 1827 to 1830, and he presided at the convention of 1831, which framed the present constitution. So far, however, as the present controversy is concerned, the convention of 1831 made no material alteration in the constitution of 1792.

Mr. Polk was elected a senator from Kent county in November, 1834, and his term expired in November, 1838. He took his seat in the senate in January, 1835, and was elected speaker. On May 9, 1836, Caleb P. Bennett, the governor, died, and Mr. Polk, who was elected speaker of the senate at its last session, assumed the executive authority on May 12.

When the legislature met in January, 1837, Mr. Polk was exercising the office of governor, and he continued to do so till January 17. At the same time he retained his seat in the senate, his name appearing in the journal as that of a senator from Kent county.

In the senate journal, January 5, 1837, the following entry appears:

> On motion of Mr. Hazzard, "Resolved, That a committee on elections be appointed to inquire into the qualifications of members."
> Whereupon, Messrs. Hazzard and Dilworth were appointed the committee.

On the following day, January 6, the journal says:

> Mr. Hazzard, from the committee on elections, made the following report: "The committee on elections beg leave to report that all the members are duly qualified."

As Charles Polk, then acting as governor, was also a senator, the report included him.

Mr. Polk subsequently served out his term in the senate.

As has already been stated, Mr. Polk was president of the convention which framed the present constitution of Delaware. All or nearly all the members of that convention were then living, and among them John M. Clayton, who was its leading spirit. Mr. Polk unquestionably held his office as senator while exercising the office of governor. The fact that he did not sit in the senate while he exercised the executive powers, is immaterial. The prohibition on which counsel lay so much stress is, as has been seen, that no person "holding" any office under the State shall exercise the office of governor. That this provision does not relate to the speaker of the senate when he exercises the office of governor, has been conclusively established.

William Temple, speaker of the house of representatives, assumed the executive authority on May 6, 1846, on the death of Joseph Maull, speaker of the senate, who had been exercising the office of governor. The legislature was not in session while Mr. Maull exercised the office of governor, and before it met in January, 1847, Mr. Temple's term as a member of the house of representatives expired. He continued, however, to exercise the office of governor till January 19, 1847, when William Tharp, an elective governor, was duly qualified.

Mr. Temple, like Mr. Stout, approved, in the exercise of the office of governor, a proposed constitutional amendment on which he had voted in the general assembly, before he assumed the executive authority.

The case of Gove Saulsbury, who, as speaker of the

senate, assumed the executive authority on March 1, 1865, on the death of Governor Cannon, presents no new features. His term as senator regularly expired in March, 1866, though the legislature was in session when Governor Cannon died, and there were special sessions in June, 1865, and January, 1866. During the regular session, and both special sessions, the senate was presided over by a speaker *pro tempore.*

But, in addition to the cases of Rogers, Sykes, Stout, Polk, Rodney, Thomas and Temple, we have the case of William T. Watson to show what the Constitution of Delaware has invariably been held to mean. It is not strange that counsel, after investigating the constitutional history of Delaware for a period of a hundred years, and finding every decision of the competent authorities against them, are driven to declare that none of these things can be "conclusive in the senate of the United States." In reality, they are asking the senate of the United States to make a new constitution for the State of Delaware.

Let us see how the senate of Delaware acts in cases of vacancies, created by the clauses of the constitution which counsel seek to apply to the case of a speaker of the senate, who exercises the office of governor.

In the senate journal, November 9, 1796, p. 2, the fact is recorded that John James was elected to the senate from New Castle county to fill the unexpired term of John Stockton, "whose seat *became vacant* by his *acceptance* of an appointment under the general government."

On page 3 of the senate journal of the same session, the following minute appears:

A writ issued by the Speaker of the Senate, directed to the Sheriff of Sussex County, was read and presented, authorizing the said Sheriff to cause an election to be holden at George Town in the county aforesaid, on the first Tuesday of October, one thousand seven hundred and ninety-six, for the purpose of electing a suitable person as Senator in the place of Thomas Laws, Esquire, whose seat *became vacant* by his acceptance of the office of *Justice of the Peace.* A return was then read from the county of Sussex, by which it appeared that Nathaniel Hayes, Esquire, was elected to supply the place of Thomas Laws, Esquire, in the Senate of this State.

The incompatibility in the case of Thomas Laws was created by the provision of the constitution, forbidding any person "holding any office under this State or the United States," from being, during his continuance in office, a senator or representative.

To clinch the fact that the competent authorities of the State of Delaware have always given to the incompatibility of offices, the same effect as has universally been ascribed to it both in this country and in England, we will refer to the case of John Bird, which arose upon the provision of the constitution forbidding any person concerned in an army or navy contract to be a senator or representative.

On January 13, 1801, Mr. Bird's right to be a senator was questioned, as is shown by the following minute from the senate journal (p. 16) of that day:

It was moved by Mr. Vining, seconded by Mr. Grantham, to adopt the following resolution, to wit:

WHEREAS, it hath been represented to the Senate of the State of Delaware, That the eleetion of John Bird of the County of New Castle, as a Senator, in the room of Archibald Alexander, Esquire, resigned, is unconstitutional upon the ground, that the said John Bird, hath and still is, concerned in certain navy contracts,

Therefore, Resolved, That a committee of three be appointed by the Senate, to examine the premises and report thereon.

The question being put for the adoption of the foregoing resolution, it was resolved in the affirmative.

The committee appointed in pursuance of the foregoing resolution, are Mr. Fitzgerald, Mr. Vining and Mr. Owens.

On the following morning, Wednesday, January 14, immediately upon the assembling of the senate, the following minute was entered:

The committee to whom was referred the resolution relative to the constitutionality of the election of John Bird, returned as a senator in the place of Archibald Alexander, who has resigned, beg leave to report, that sufficient evidence has appeared to the committee, that the said John Bird was at the time of his election concerned in certain naval contracts under the United States, *which by the constitution vacates his seat in the senate.*

Resolved, Therefore, that the speaker of the senate issue a writ, directed to the sheriff of New Castle County, to hold an election and notify the electors of said county that the said election will be held on Wednesday, the 21st instant, for the purpose of supplying the said vacancy.

It was moved by Mr. Vining, seconded by Mr. Grantham, that the foregoing report be adopted, and on the question it was resolved in the affirmative.

At the election held on the above date, "Robert Maxwell was duly elected a senator, for the said county, in the place of the said John Bird, *declared ineligible.*"

Counsel argue that because the vice-president of the United States succeeds, on the death of the president, to the latter office, and ceases to be vice-president, the speaker of the senate of Delaware must, when called to exercise the office of governor, cease to be a senator. We might dismiss this argument with the observation that the practice in the case of the vice-president of the United States is not a construction of the constitution of Delaware, especially as constitutional lawyers are not agreed as to the case of the

vice-president, as an original question. But, if the vice-president becomes president, it necessarily follows that he ceases to be vice-president. The latter office is merged in the former; a president cannot be a vice-president to himself.

But, let us inquire how constitutional provisions, substantially the same as those involved in the present case, have been construed in another State. The constitution of Delaware of 1792 was based on the constitution adopted by Pennsylvania in 1790; and as Delaware, in her constitution of 1831, substantially transferred from her constitution of 1792 the provisions involved in the present case, so did Pennsylvania, in her constitution of 1838, substantially preserve the similar provisions in her constitution of 1790.

The constitution of Pennsylvania of 1838 provides, Article II, Section 5, that "No member of congress, or person holding office under the United States or this state, shall exercise the office of governor;" and, by section 14 of the same article, that "in case of the death or resignation of the governor, or his removal from office, the speaker of the senate shall exercise the office of governor till another governor shall be duly qualified."

On July 9, 1848, the general assembly of Pennsylvania not being in session, Governor Shunk resigned, and William F. Johnston, who was chosen as speaker of the senate at the last preceding session, took an oath faithfully to discharge the executive duties, and entered upon the exercise of the office of governor.

The general assembly met on January 2, 1849. In the mean time, an election for governor had been held, and Mr. Johnston had become governor-elect, but his term as governor did not begin till January 17, 1849. When the general assembly met, George Darsie was chosen by the senate as speaker *pro tempore*, and Mr. Johnston's name appears in the journal as that of a senator, whose term was to continue till 1850.

But, still more unequivocal are the following extracts from the senate journal of January 13, 1849, showing what Mr. Johnston, who was then exercising the office of governor, did in anticipation of his inauguration as elective governor on the 17th of the month:

To the Honorable the Senate of Pennsylvania:

Senators—I hereby tender my resignation as Speaker of the Senate of Pennsylvania. * * *

I remain respectfully,
Your obedient servant,
WM. F. JOHNSTON.

13th January, 1849.

To the Hon. George Darsie, Speaker of the Senate:

Sir.—Permit me, through your kindness, to present to the Senate my resignation as a member of that body.

I am truly yours,
WM. F. JOHNSTON.

13th January, 1849.

These communications having been disposed of, Mr. Darsie resigned the office of speaker *pro tempore*, and was elected speaker.

Can more be asked, to demonstrate the groundlessness of the contention that the speaker of the senate,

when specifically authorized to exercise the office of governor, is subject to the general provision that no person holding any office under the state shall exercise the office of governor?

The true construction was doubtless in the minds of the framers of the Pennsylvania constitution of 1873, when they inserted in that instrument (Art. IV) the following express provision:

> SEC. 14. In case of a vacancy in the office of lieutenant-governor, * * * the powers, duties and emoluments thereof for the remainder of the term, or until the disability be removed, shall devolve upon the president *pro tempore* of the senate; and the president *pro tempore* of the Senate shall in like manner become governor if a vacancy or disability shall occur in the office of governor; his seat as senator shall become vacant whenever he shall become governor, and shall be filled by election, as any other vacancy in the senate.

When on May 9, 1895, William T. Watson took the chair in the senate of Delaware, it did not occur to any one to question his right to do so. His seat as senator was not vacant, and the presiding officer, who had acted in his absence from the senate, was merely a speaker *pro tempore*. The uniform construction of the constitution for a hundred years had been adhered to in his case. Though a month had elapsed since he began to exercise the office of governor, no one had suggested that his place as senator, or as speaker of the senate, was vacant; and no step had been taken to vacate them. He continued in fact and in law to be a senator. The member of the senate who, after entering the joint assembly and voting for three hours without protest, suddenly arose and declared that Mr. Watson, who had all the while been presiding

and voting, "was not now a senator," contradicted the record and stultified himself. His suggestion was clearly an afterthought. Nothing but a moment of despair, at the end of a long succession of fruitless ballots in one day, and of almost four months' vain effort to elect a United States senator, could have prompted the transparent attempt suddenly to reverse a century's observance of the constitution and to deny what had never before been doubted.

In accordance with the doctrine of the senate of the United States, Mr. Watson, since he was a member of the senate of Delaware, not only was entitled to vote, but he might even have voted to elect himself to the United States senate. The senate so held in the case of Ephraim Bateman, of New Jersey, in 1828. In that case the vote of the joint assembly of New Jersey being a tie, Mr. Bateman, who was a member of the legislature, vice-president of the State, chairman of the joint assembly, and at the same time a candidate for the United States senate, solved the difficulty by voting for himself. The senate of the United States decided that his election was valid, upon the ground that he "was a member of the legislature of New Jersey, duly elected and competent to the exercise of every legislative power, not forbidden by its laws, among which the right to vote in the election of a senator was one." Taft's Senate Election Cases, pp. 96–98.

The soundness of this decision will hardly be questioned. It rests upon the principle, against which no authority has been produced, that the constitutional in-

cumbent of an office is not to be disqualified by implication from discharging its functions. The committee of the senate, to whom the case was referred, declined to go into the question "of the propriety or delicacy" of Mr. Bateman's action, or to apply to it "any abstract principles." While it was, they observed, undoubtedly competent for the State, by its organic law, to provide that the interest of a member of the legislature, in any subject of legislative action, should constitute, as to that subject, a disqualification for the discharge of his functions, "no such provision" existed; and Mr. Bateman was therefore competent to exercise his powers, even to the extent of voting for himself for a seat in the United States senate.

Counsel for the claimant, finding the positive construction of the constitution against them, are reduced to the expedient, wholly inadmissible under the circumstances, of urging, at various places in their brief, arguments of convenience. But, while some of the fancied inconveniences have no foundation at all, it will be found that others may flow from the executive participation in legislative functions authorized by most of our constitutions. We have seen how, in Rhode Island, the governor is expressly made the presiding officer of the senate, with a casting vote. So, where the lieutenant-governor has, as presiding officer of the senate, a casting vote, he has it in his power most materially to affect legislation. The same thing may be said as to the exercise by the governor of the veto power. Counsel for the claimant depict the speaker of the senate of Delaware, while exercising the office of governor, as

creating a deadlock in the proceedings of the senate for his own advantage, forgetting that the senate of Delaware consists of nine senators, and may be in a perpetual deadlock unless the speaker can cast his vote. They also refer to the provision of the Delaware constitution, which empowers the governor to make recommendations to the general assembly, and recoil at the spectacle of the governor being permitted to enter the senate and vote for measures which he has recommended. Yet, while the governor of Delaware would, in such case, cast one vote out of nine in favor of his own recommendations, the governor in most of our States may, by a stroke of his pen, block the action of the whole legislature, if his recommendations are disregarded. Counsel lay great stress on the impropriety of permitting a governor to take part as a senator in the trial of his own impeachment. They forget that the members of the senate, sitting as a court of impeachment, sit as judges not as legislators, and that by the well-settled principles of the common law a senator would be disqualified from sitting as a judge in his own case.

The desperate positions into which counsel are forced are signally illustrated by their declaration (p. 23 of their brief), that "the simultaneous exercise, by one man, of the office of president of the United States and the office of president of the senate of the United States, would not be so strange a spectacle as the simultaneous exercise, by one man, of the office of governor of Delaware and the office of speaker of the Delaware senate." And the reason for this declaration is that

the governor of Delaware has no veto and the senate no executive functions, while the president of the United States possesses the veto and the senate participates in executive acts. In the view of counsel, the separation of powers admits of no middle course; and the more you unite executive and legislative functions in the same person, the less incongruous it is still further to unite them. To combine the power to vote with the power to veto, is not so strange as to give the power to vote without the power to veto! We think that Montesquieu and Madison would have been perplexed by this paradoxical development of the theory which they expounded so lucidly.

But, in this relation it is proper to point out that a member of the legislature, in voting for a United States senator, does not exercise what may ~~actually~~ accurately be called a legislative function. He acts as an elector, precisely as, in the trial of an impeachment, a member of the senate sits as a judge, and performs a judicial, not a legislative, function. A United States senator is not a legislative act; he is a ~~lawyer~~ lawgiver, not a law—a human being, not a statute.

Indeed, in view of the single fact that the constitution of the United States expressly authorizes the governor of a State, where a vacancy happens during the recess of the legislature, temporarily to *appoint* a United States senator, what becomes of the elaborate argument of counsel on the supposed incompatibility of executive and *legislative* functions in the present case, and of their animadversions upon the theoretical impropriety of allowing a person who exercises the office of governor, to participate in the choice of a United States senator?

VIII.—Groundlessness of Theory of Suspension from Office.

Having failed in their effort to show that the speaker of the senate of Delaware, when he assumes the executive functions, vacates his senatorial office, counsel for the claimant are forced to invent a theory of implied suspension from office, or from the functions of office. In order to do this, they are compelled to ascribe to the incompatibility of offices the very consequence which it has always been the object of the law to prevent. While the law says that two incompatible offices cannot be held by the same person, because he cannot properly perform the duties of both, counsel would defeat the rule by an implied suspension of the functions of one of them.

No doubt such a condition of things may be specially created. Thus by the constitution of Maine (Art. V., Sec. 14), it is provided that when the office of governor shall become vacant, "the president of the senate shall exercise the office of governor till another governor shall be duly qualified," and that, whenever the president of the senate "shall so exercise said office," his "duties as president shall be suspended; and the senate * * * shall fill the vacancy until his duties as governor shall cease."

But, in the absence of an express provision of this character, the spectacle of an officer stripped of the powers of his office is an anomaly in the law.

Even where a power to remove an officer is given, the better opinion is that it does not carry a power to suspend, though in such a case it might well be argued

that the greater power included the less. But, on the other hand, it is said that "a mere suspension would not create a vacancy, and the anomalous and unfortunate condition would exist of an office, an officer, but no vacancy, and of no one whose right and duty it was to execute the office." Mechem on Public Offices and Officers, § 453. See Gregory *vs.* Mayor, 113 N. Y., 416.

The purpose of the constitution of Delaware, in respect of the matter we are now considering, is to fill vacancies, not to create them. If we accept the theory of counsel for Mr. Du Pont. that the speaker of the senate, when exercising the office of governor, is suspended from his functions as senator, though he continues to hold his senatorial office, we are confronted with a violation of the provisions of the constitution of Delaware, in regard to representation. As has been seen, the constitution provides that three senators and seven representatives shall be chosen in each county. This plan of representation has been steadily adhered to, in spite of the opposition engendered by inequality in the population of the three counties. The disproportion of county representation to popular representation would be still further aggravated, if the speaker of the senate, when called upon to exercise the office of governor, happened to be a senator from the most populous of the three counties. According to the constitution, as construed for more than a hundred years, his office as senator would not become vacant; but, according to the theory conceived by counsel in 1895, he would be suspended from his functions. We should thus have a vacancy in fact, but not in law, a vacancy

to which the provisions of the constitution and the laws for the filling of vacancies were inapplicable.

The argument of counsel therefore involves not merely the suspension of Mr. Watson's right to execute the office of senator, but also the suspension of the powers of the office. Yet, throughout the entire system of Delaware laws, organic and statutory, there is not a single example of the suspension of the powers of a public office created for the public good; and the constitution and the statutes have carefully provided against such a contingency. Thus, where a judge becomes incompetent to sit in a cause, provision is made for the transfer of his powers in respect of the particular cause to another. Similar provision is made in the case of sheriffs and of registers of wills. But, while counsel have advanced the theory of an implied suspension of the powers of a great public office, in the exercise of which the people of an entire county are interested, they have failed to cite a single example of such a political and legal paradox.

We are fortunate, however, in being fortified by eminent authorities upon this point of suspension—authorities who more than answer every argument of inconvenience, of incompatibility, of violations of theory, of difficulties and absurdities, which counsel have striven to raise upon the constitution of Delaware.

Section 1, Article II, of the constitution of the United States, provides that "congress may by law provide for the case of the removal, death, resignation or inability both of the president and vice-president, declaring what officer shall then act as president, and such officer

shall act accordingly, until the disability be removed, or a president shall be elected."

In pursuance of this provision, congress in 1792 enacted a statute designating the president *pro tempore* of the senate as the officer to act in the contingency mentioned.

In 1886 congress passed another law changing the succession. The following extracts from the debates on that occasion will explain themselves:

In speaking of the inconveniences which might arise under the provisions of the act of 1792, Senator Hoar said:

> It is inconvenient, also, because it would be almost impossible for the President of the Senate to continue to perform the functions of his office, which is the principal office, to which the Presidency of the United States is made a mere adjunct or appendix in the contingency which is provided for by law. Nothing can be conceived more awkward, more repugnant to our sense of propriety, than for the President of the United States to sit in the chair of the Senate and preside over and listen to discussions in regard to his own nominations, voting upon them himself as an equal in the Senate, and presiding over and listening to the severe criticisms of executive policy which in times of high party antagonisms must be always heard in this Chamber, and ought to be always heard in this Chamber.
>
> Then the political functions are devolved by the present arrangement upon an officer changeable at the will of this body. The president of the senate may be removed from time to time by the majority of the senate, after the Presidential functions have devolved upon the office as before.

The inconveniences here depicted by Senator Hoar immeasurably surpass all that could possibly arise in Delaware, by the simultaneous exercise by the same person of the powers of speaker of the senate and governor; yet, they were not considered a sufficient [illegible] for suspending the powers of a senator; and the [illegible] do away with the

manifest difficulties attending the succession under the act of 1792.

Senator Maxey in the course of the debate said:

> Now, in reference to the designation of the Chief-Justice as President *pro tempore* of the Senate, as indicated by the report of the judiciary committee in 1856, I call attention to Mr. Madison's view in the debate in the first congress of the United States, as shown in the Annals of Congress, page 855; and if there is any higher authority than Mr. Madison on a question like this, I do not know it.
>
> "Mr. Madison objected to the Chief-Justice, as it would be blending the judiciary and the executive. He objected to the President *pro tempore* of the Senate. He will be a Senator of some particular State, liable to be instructed by the State, and will still hold his office; thus he will hold two offices at once."

Senator Beck incorporated, in a speech on the same subject, a letter from Mr. D. F. Murphy, official reporter of the senate, reviewing the history of the clauses in the constitution and the act of 1792. In this letter, which Mr. Beck described as "a paper prepared with absolute impartiality and great ability," Mr. Murphy reached the conclusion that "the president *pro tempore* of the senate, if designated as acting president, would still retain his position as senator and as presiding officer of the senate."

It is obvious, especially when we consider the similarity of the provisions of the act of 1792 and of the constitution of Delaware, that the opinions of Mr. Madison, of Senators Hoar, Maxey and Beck, and of Mr. Murphy, are completely adverse to the contentions of counsel for Mr. Du Pont.

The act of 1792 declares that in case of the removal, death, resignation, or inability of both the president and vice-president, "the president *pro tempore* of the

senate shall act as president until the disability be removed or a president shall be elected."

The Delaware constitution provides that in the case of a vacancy in the office of governor, the speaker of the senate "shall exercise the office until a governor elected by the people shall be duly qualified."

The similarity of these provisions is apparent.

Though counsel for the claimant seek to distinguish between the phrase "act as president" and the phrase "exercise the office," they both signify substantially the same thing. Both necessarily imply the possession of the powers of the office, and in both cases such posession is given for the purpose of meeting the same or similar emergencies.

Counsel for the claimant invoke the maxim *Contemporanea expositio fortissima est in lege*, in support of the proposition that the abstention of Messrs. Sykes, Stout, Rodney and Polk, while exercising the office of governor, from sitting in the senate, is to be received as establishing an implied disqualification in that regard. We fully admit that in the positive construction of the constitution contemporaneous interpretation is very weighty ; but it is not to be invoked indiscriminately. Story, in his Commentaries on the Constitution, section 407, says :

> Contemporary construction is properly resorted to to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause. * * * It can never abrogate the text, it can never fritter away its obvious sense, it can never narrow down its true limitations, it can never enlarge its boundaries.

Judge Cooley, in his Constitutional Limitations, p. 84, declares that Judge Story's rule embodies "the

true and only safe rule in regard to the application of contemporaneous construction."

The doubts to which these learned writers refer are legitimate doubts, arising from the instrument itself, and not such as are created by an attempt to fit the constitution of a State to a fanciful theory of government.

Apart from the fact heretofore noticed, that the contemporaneous construction suggested by counsel would create unvacant vacancies which could not be filled, suspend the powers of legislators, and deprive the people of their constitutional representation, it cannot be admitted that the mere non-exercise by certain persons of powers inherent in their offices can operate to destroy such powers and denude the offices of their functions. Strong as is the effect of usage in the English constitution, it is generally conceded that the crown has not lost the veto, though the power has not been exercised for nearly two centuries. But the repeated action of the senate of Delaware in holding that the speaker, while exercising the office of governor, continued to be a senator, and in determining and filling vacancies in other cases, was on each occasion a matter of positive construction, the absolute force of which must be acknowledged. The non-exercise by a speaker of the senate of his senatorial office, while he exercises the office of governor, may be prompted by various motives; but it cannot preclude a successor from asserting the powers of the office, if he sees fit to do so. Public offices are not created merely to be held; they are created to be exercised. Apart from an express constitu-

tional or statutory provision, it is impossible to maintain that a person may hold two offices, the duties of which, by reason of their incompatibility, he cannot perform. The law does not tolerate such an incongruity; nor can the people be deprived of their constitutional representation by implication.

IX.—FINALITY OF LEGISLATURE'S ACTION ON QUALIFICATIONS OF MEMBERS.

Counsel for claimant seek to remit to the senate of the United States the question of Mr. Watson's right to act as a senator in the senate, and in the joint convention, of the general assembly of the State of Delaware. If the United States senate is not authorized to determine that question for itself, then Mr. Du Pont's claim must on that ground alone hopelessly fail.

By section 6, Article II, of the constitution of Delaware, it is provided that "Each house shall judge of the elections, returns, and qualifications of its own members."

By sections 3 and 12 of Article II of the same constition, the qualifications of senators are as follows:

Section 3. * * * No person shall be a senator who shall not have attained to the age of twenty-seven years, and have in the county in which he shall be chosen a freehold estate in two hundred acres of land, or an estate in real and personal property, or in either, of the value of one thousand pounds at least, and have been a citizen and inhabitant of the State three years next preceding the first meeting of the legislature after his election, and the last year of that term an inhabitant of the county in which he shall be chosen, unless he shall have been absent on the public business of the United States or this State. * * *

Section 12. * * * No person concerned in any army or navy contract, no member of Congress, nor any person holding any office under this State or the United States, except the attorney-general, officers usually appointed by the courts of justice respectively, attornies at law, and officers in the militia, holding no disqualifying office, shall during his continuance in Congress or in office be a senator or representative.

On p. 29 of their brief, counsel for the claimant expressly admit the conclusiveness of the finding of the Delaware senate on the qualifications specified in section 3, but they mar the admission by coupling with it the surprising assertion that the qualifications mentioned in that section are all the qualifications prescribed in the whole constitution. We should be inclined to think that counsel were entirely unconscious of the existence of section 12, if it were not for the fact that it is printed at large in their brief. We are therefore forced to conclude that they cherish the belief that the framers of the Delaware constitution foresaw the Du Pont claim of the future, and that with this foresight they framed section 12 for the express purpose of promoting the claim before the United States senate.

But, the only distinction between section 3 and section 12, is, that the former declares what a senator shall possess, and the latter what a senator shall not possess—a distinction without a difference, unless indeed we are to assume that because each house is made the judge of the "qualifications" of its own members, the Delaware senate has jurisdiction of *qualifications*, but not of *disqualifications*, and must admit a person elected as a senator, though he rests under every disqualification

mentioned in section 12. It is unnecessary to refute such a proposition. When either house acts on the qualifications of its members its action embraces the whole subject, both qualifications and disqualifications, for it is obvious that a member cannot be qualified if he is disqualified.

Now, to say nothing of the uniform action of the senate in all prior cases, and its express judgment in the case of Charles Polk, while he was exercising the office of governor (*supra*, p. 47), as to the retention of the senatorial office, it is a fact that the senate of Delaware did directly act on William T. Watson's qualifications as a member of that body. Counsel are in error when they are led to assert (p. 2 of their brief) that "from the time he took the oaths of office and assumed the functions of governor, until the final joint assembly of the two houses, on the 9th day of May, Governor Watson did not, upon any occasion, take any part either in the proceedings of the senate or of the joint assembly." Between the hours of eleven and twelve, on the morning of the 9th of May, before the final joint assembly convened, the general assembly met in ordinary session, each house sitting in its own chamber. In the senate William T. Watson, speaker, occupied the chair, received and put motions, and voted on bills, without suggestion of disability or impropriety from any quarter. He was recognized by every member of the senate as its presiding officer.

As to the conclusiveness of the action of the Delaware senate on the qualifications of William T. Watson as

one of its members, we may refer to Cooley on Constitutional Limitations, page 158, where the learned author says:

> There are certain matters which each house determines for itself, and in respect to which its decision is conclusive. It chooses its own officers, except where, by constitution or statute, other provision is made; it determines its own rules of proceeding; it decides upon the election and qualification of its own members. These powers it is obviously proper should rest with the body immediately interested, as essential to enable it to enter upon and proceed with its legislative functions without liability to interruption and confusion.

Discussing the same subject in State *vs.* Gilmore, 20 Kan. 551, 554, Judge Brewer said:

> The constitution (of Kansas), declares, article II, section 8, that "each house shall be judge of the elections, returns and qualifications of its own members." This is a grant of power, and constitutes each house the ultimate tribunal as to the qualifications of its own members. The two houses acting conjointly do not decide. Each house acts for itself and by itself, and from its decision there is no appeal, not even to the two houses. * * * * * * * By section 5 of the same article, acceptance of a federal office vacates a member's seat. He ceases to be qualified and of this the house is the judge. If it ousts a member on the claim that he has accepted a federal office, no court or other tribunal can reinstate him. If it refuses to oust a member, his seat is beyond judicial challenge. This grant of power is, in its very nature (and so as to any other disqualification), exclusive; and it is necessary to preserve the entire independence of the two houses.

See, also, People *vs.* Mahaney, 13 Mich., 481;
Dalton *vs.* State, 13 Ohio State, 652.

If the jurisdiction with which each house of the general assembly of Delaware is invested to judge of the elections, returns and qualifications of its own members, excludes the courts of Delaware from inquiring into the subject, there certainly is no other tribunal that can take jurisdiction of it.